FILE COPY

APR 20 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1442

DEAN FOODS COMPANY, INC.,
Petitioner,

vs.

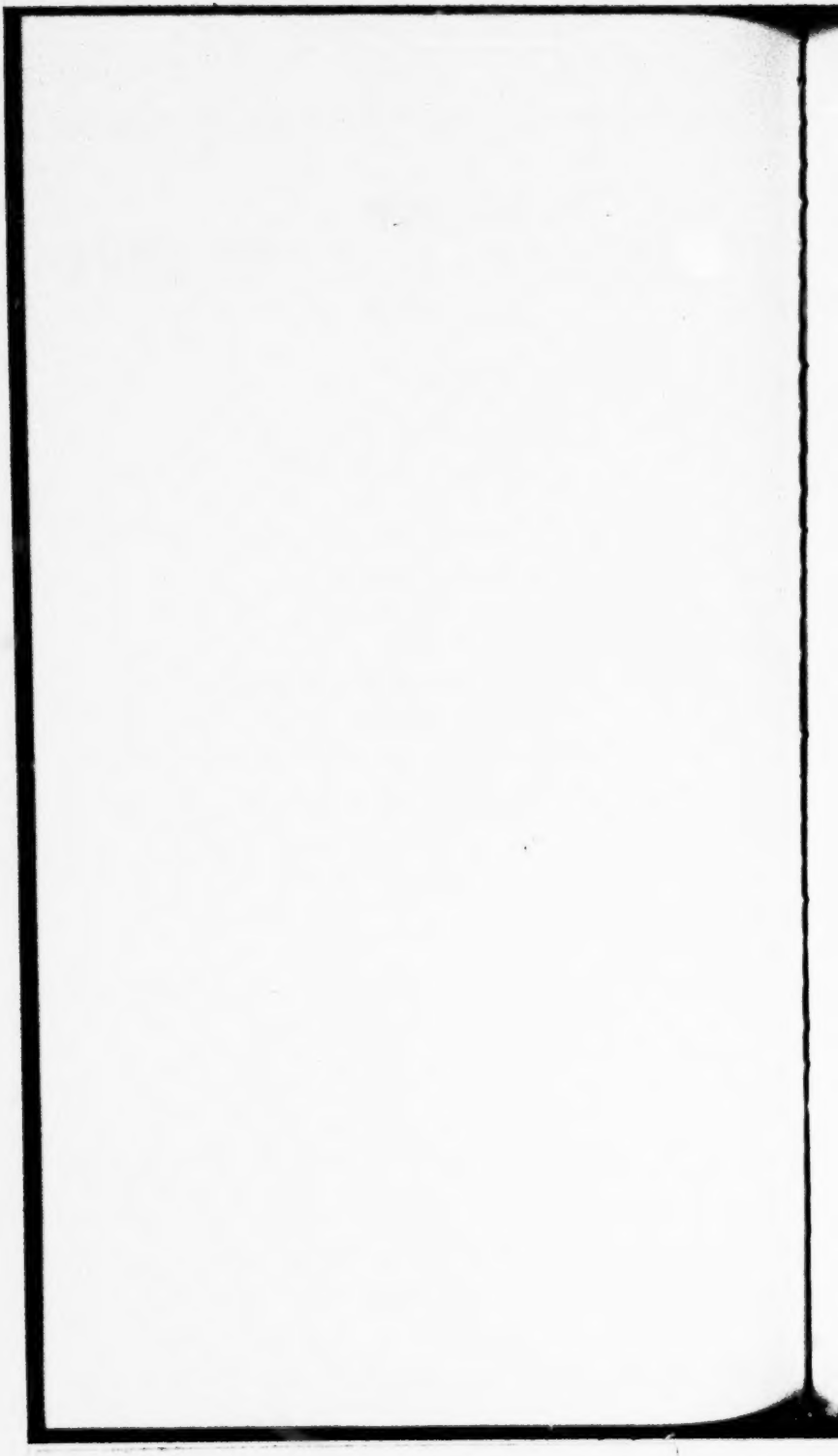
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

FOWLER, BRACKHAHN, YOUNG & PERL
NEWELL N. FOWLER
RICHARD A. BRACKHAHN
Memphis Bank Building
44 North Second Street
Suite 603
Memphis, Tennessee 38103
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477



BLEED THROUGH POOR COPY

INDEX

Page

Prayer 1

Opinions 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Reasons for Granting Writ of Certiorari

A. The court below has approved expedited procedures of the National Labor Relations Board that are contrary to the intent of Congress, contrary to the Act, and contrary to the National interest 11

B. The decision below is in conflict with the decision of the Second Circuit with regard to these expedited procedures promulgated by the National Labor Relations Board 16

Conclusion 21

Appendix

A. Order of the United States Court of Appeals for the Sixth Circuit A-1

B. Opinion of the United States Court of Appeals for the Sixth Circuit A-2

C. Decision and Order of the National Labor Relations Board A-5

D. Trial Examiner's Decision A-7

E. Decision and Certification of Representative ...A-19

F. Regional Director's Report and Recommendations on Objections A-22

Certificate and proof of service A-35

CITATIONS

Cases:

Baltimore and Ohio Railroad Company v. United States, 289 U. S. 349, 56 S. Ct. 797 19

Baush & Lomb, Inc. v. NLRB (CA-2, 1968), 404 F. 2d 1212 15

Fox Film Corporation v. Trumbull, D. C. Conn., 7 F. 2d 715, 727 14

Graphic Arts Finishing Co. v. NLRB (CA-4, 1967), 380 F. 2d 893 15

Hannah v. Larche, 363 U. S. 480, ... S. Ct. 1502 .....19, 20, 21

Home Town Food, Inc. v. NLRB (CA-5, 1967), 379 F. 2d 241 15

Jenkins v. McKeithen, 89 S. Ct. 1843 .....19, 21

Morgan v. United States, 304 U. S. at 18, 58 S. Ct. 776 19

National Labor Relations Board v. Indiana and Michigan Electric Company, 318 U. S. 9, 28, 63 S. Ct. 395 (1943) 17

National Labor Relations Board v. Mattison Machine Works, 81 S. Ct. 434 18

NLRB v. Capital Bakers, Inc. (CA-3, 1965), 351 F. 2d 45 14

NLRB v. Smith Industries, Inc., 403 F. 2d 899 (CA-5, 1968) 17

NLRB v. The Process Corporation, 412 F. 2d 215 (CA-7, 1969) 17

NLRB v. Trancoa Chemical Corporation (CA-1, 1962), 303 F. 2d 456 .....14, 15

BLEED THROUGH POOR COPY

Pepsi Cola Bottling Company v. NLRB, 409 F. 2d 676 (CA-2, March, 1969) 16, 18

Sonoco Products Corp. v. NLRB (CA-9, 1968), 399 F. 2d 835 15

Statutes:

28 U. S. C., Sec. 1254(1) 2
29 U. S. C., Sec. 160(e) 2
29 U. S. C., Sec. 160(f) 2
National Labor Relations Act as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U. S. C., Sec. 151 et seq.) 3, 4, 9, 10, 11, 12

Other Authorities:

29 C. F. R. 102.62 ..... 7, 12
29 C. F. R. 102.69 ..... 6, 12, 13
Black's Law Dictionary, West Publishing Co., 4th Edition 1951 14
Congressional Record, Senate, June 5, 1947, 93 Cong. Rec. 6611 11

BLEED THROUGH POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

DEAN FOODS COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The Dean Foods Company, Inc., Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on January 20, 1970 and granting enforcement of an Order issued against Petitioner[1] by the National Labor Relations Board.

[1] Petitioner herein was designated as "Respondent" before the court below; concurrently Petitioner herein was designated as "Respondent" or the "Employer" before the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, *infra*, pp. A-2—A-4) is not yet officially reported. The conclusions of law and Order of the National Labor Relations Board is reported at 171 NLRB 60 (Appendix C, *infra*, pp. A-5—A-6). The decision of the Regional Director for the Twenty-Sixth Region of the National Labor Relations Board, out of which the incident case arises, is not officially reported (Appendix F, *infra*, pp. A-22—A-34).

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was rendered on January 20, 1970 (Appendix A, *infra*, p. A-1); and its opinion was entered the same day, that being specifically January 20, 1970 (Appendix B, *infra*, pp. A-2—A-4). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1) and Sec. 10 (e) and (f) of the National Labor Relations Act, as amended, 29 U. S. C., Sec. 160 (e) and (f).

QUESTIONS PRESENTED

1

Does the National Labor Relations Board have the authority to compel and order the Petitioner to recognize and bargain with a labor organization when it has not independently (or otherwise) reviewed the findings of fact, evidence presented, or conclusions at law of a subdelegatee?

2

Does the National Labor Relations Board have the authority to compel and order the Petitioner to recognize and

BLEED THROUGH POOR COPY

bargain with a labor organization when it did not afford this Petitioner the opportunity to resolve evidentiary conflict by confrontation with, and cross-examination of, witnesses; nor even afford or conduct a hearing at any stage of these proceedings?

3

In the alternative, if it is found that the National Labor Relations Board exercised procedural due process required by law and therefore, afforded "fair" treatment to the issues and to the Petitioner, is the determination of the National Labor Relations Board that a fair election was held among the employees based on substantial evidence?

STATUTES INVOLVED

The National Labor Relations Act as amended (61 stat. 136; 72 stat. 945; 73 stat. 544; 29 U. S. C., Sec. 151 et seq.), insofar as is herein pertinent provide:

Section 7. "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . and shall also have the right to refrain any and all such activities . . ."

Section 8 (a). "It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees. . . ."

Section 9 (c)(5)(d). "Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification in the record of such investigation shall be

included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f) . . ." (emphasis supplied).

Section 10 (a). "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices affecting commerce."

Section 10 (b). "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint" (emphasis supplied).

Section 10 (c). "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of the Act." (Emphasis supplied.)

Section 10 (e). "The findings of the Board with respect to questions of fact if supported by substantial evidence of

the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction to the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence be taken before the Board, its member, agent, or agency and to be made a part of the record . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive in its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of title 28." (Emphasis supplied.)

STATEMENT OF THE CASE

In substantial respects the facts of this matter are not in dispute save one critical issue.[2] It was mutually agreed between these parties that on July 20, 1967, pursuant to a Stipulation for Certification upon Consent Election, the Regional Director for the Twenty-Sixth Region of the National Labor Relations Board residing in Memphis, Tennessee would conduct and hold an election among the Petitioner's employees in a unit again reached upon Stipulation and agreement between these parties (J. A., pp. 5, 6).[3] The results of that election disclosed that twenty-three (23) employees cast respective votes for the petitioning labor organization, while seventeen (17) employees cast their respective ballots against it; there also remained five (5) challenged ballots in this close determination (J. A., p. 7).

Because of alleged campaign trickery, and other coercive conduct by the labor organization involved, this Petitioner did timely file Objections to this election (Pa. 9, 10).

Admittedly, Section 102.69 (c), 29 C. F. R. 102.69 (c) of the Board's Rules and Regulations formulated the procedure upon which an investigation of these Objections could be conducted by the Regional Director for the Twenty-Sixth Region.

In this respect, it is critical for the parties and this Court to distinguish the difference between a "Stipulation

---

[2] The factual area of disagreement remaining is whether or not the "Board" itself actually reviewed the record of this matter before the Regional Director; the Petitioner contends the National Labor Relations Board did not independently review the evidence presented.

[3] "J. A." refers to the printed Joint Appendix presented to the court below.

BLEED THROUGH POOR COPY

for Certification upon Consent Election" agreement which is governed by the procedures of Section 102.62 (b) of the Board's Rules and Regulations to that merely of a "Consent Election" which is restricted by the limitations imposed in Section 102.62 (a) of the Board's Rules and Regulations.[4]

It is, therefore, noted in the latter consent agreement procedures that "the rulings and determinations by the

[4] Sec. 102.62 Consent-election agreements.—(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 **except that the rulings and determinations by the regional director of the results thereof shall be final,** and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, **enter into an agreement providing** for a waiver of hearing and **a consent election leading to a determination by the Board of the facts ascertained after such consent election,** if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 (emphasis supplied).

Regional Director of the results thereof shall be final." Conversely, under the "Stipulation for Certification upon Consent Election," the parties "enter into an agreement providing . . . a consent election leading to a determination by the Board of the facts ascertained after such consent election . . ." Simply expressed, these parties are bound by facts ascertained after the election, which are determined by the Board; **not** by the final determinations of the Regional Director of the Twenty-Sixth Region residing in Memphis, Tennessee.

The Petitioner will hereafter show that this case has proceeded with the treatment of the Regional Director's rulings and determinations as final; and conversely, that the Board, upon whom Congress alone vested this responsibility, did neither see, consider, ascertain, or determine the facts of this matter. The result being that the Respondent's Order against this company is based upon findings of fact and conclusions of law rendered with binding finality by only a subdelegatee, i. e., the Regional Director.

This Regional Director's Report and Recommendations on Objections issued on September 1, 1967, and summarily concluded that the Company's Objection were without merit and recommended that they be overruled (Appendix F, *infra*, pp. A-22—A-34). Thereafter, the National Labor Relations Board utilized its expedited procedure to find that this company had violated a federal statute and had engaged in unfair labor practices which Order, on January 20, 1970, upon Petition for Enforcement by the National Labor Relations Board received judicial condonation and enforcement. This Petitioner hereby questions not only judicial enforcement of such an Order, but more pointedly, the expedited procedure which is hereafter explained.

On September 7, 1967, the Petitioner filed timely and appropriate exceptions to the Regional Director's Report

BLEED THROUGH POOR COPY

and Recommendation on said Objections and specifically, requested review by the National Labor Relations Board of the Regional Director's Report (J. A., pp. 23-32). Thereafter, on October 20, 1967, the Board issued its Decision and Certification of Representative which literally adopted the Regional Director's findings and recommendations; concluding that no substantial issue of fact or law existed that would warrant the reversal of the Regional Director's findings and recommendations or further require a hearing of this matter (Appendix E, *infra*, pp. A-19—A-21). Accordingly, the Respondent certified the petitioning labor organization as representative of these employees. Thereafter, on November 7, 1967, the Petitioner filed a Request to Review and Reconsider the Board's action and decision as rendered (J. A., pp. 35-41). This request was duly considered and denied on November 17, 1967 (J. A., p. 42).

On December 1, 1967, the then ostensibly certified labor organization filed an unfair labor practice charge against this company alleging that it had refused to bargain collectively with the union (J. A., p. 43). Thereafter, a complaint issued from the office of the General Counsel of the National Labor Relations Board and a notice of hearing distributed to these parties; the complaint against the company alleged violations of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act (J. A., pp. 44-48). However, before a hearing of this cause was afforded to these parties, Counsel for General Counsel for the National Labor Relations Board on January 5, 1958, submitted a Motion for Judgment on the Pleadings only (J. A., pp. 53-56). The Board's representative therein asserted that the violations alleged in the Complaint against this company were conclusively established and that no hearing was necessary or required.

On July 9, 1968, a duly appointed Trial Examiner of the National Labor Relations Board, one Charles W.

Schneider, issued an Order to Show Cause on the Motion for Judgment on the Pleadings by which the company was directed to show cause on or before January 25, 1968, as to whether or not this expedited treatment should be granted (J. A., p. 57). In response, the Petitioner on January 23, 1968, filed a response to General Counsel's Motion for Judgment on the Pleadings, and further, attached an appropriate Motion to Produce Evidence directed at certain documents and affidavits possessed and maintained by the Regional Director for the Twenty-Sixth Region in Memphis, Tennessee and asserting that said documents and affidavits be produced and made a part of the record before the Trial Examiner (J. A., pp. 58-60).

Both the Petitioner's Motion to Produce Evidence concerning admittedly absent documents and affidavits and its response to the Motion for Judgment on the Pleadings were rejected and denied; conversely, the request for expedited treatment by General Counsel of the National Labor Relations Board was held appropriate by the Trial Examiner's Decision that issued on February 16, 1968 (Appendix D, *infra*, pp. A-7—A-18).

Thereafter, on March 17, 1968, this company filed timely Exceptions to the action and legal determinations taken by the appointed Trial Examiner of the National Labor Relations Board (J. A., pp. 74-76). As provided under Section 3 (b) of the National Labor Relations Act, the Board delegated its powers in this matter to a three member panel, who adopted in their entirety the Trial Examiner's findings, conclusions, and recommendations and held in substance that the Petitioner had violated Section 8 (a) (1) and (5) and the National Labor Relations Act (Appendix C, *infra*, pp. A-5—A-6) as amended. It thereupon ordered the Petitioner to take certain affirmative action which is synonymously reflected in the Trial Examiner's Decision (J. A., pp. 70-72).

BLEED THROUGH POOR COPY

Approximately one year later, the National Labor Relations Board applied for enforcement of its Order against this company to United States Court of Appeals for the Sixth Circuit and thereafter, in a per curiam opinion of that Court, the Board's application was granted without modification (Appendix B, *infra*).

REASONS FOR GRANTING THE WRIT

The Court Below Has Approved Expedited Procedures Now Used by the National Labor Relations Board That Are Contrary to the Intent of Congress, Contrary to the Act, and Contrary to the National Interest.

This Petitioner feels as though it has pursued its rights before a local magistrate setting in a rural area of certain parts of these United States and has thereafter, been treated to judicial consideration, procedures, and the same due process at law that is often compared to an animal indigenous to the Commonwealth of Australia. Although Petitioner quickly recognizes that how it "feels" in this matter remains irrelevant, that conversely, the issues raised by this Petitioner effect not only it, but all other parties who "consent" to have the rights of their employees expeditiously and peaceably determined. To "consent" to such a determination clearly is an objective of the Act[5] and effectuates its purpose, as well as, those of Congress[6] and those who administer the delicate balance between the great socio-economic interests of these United States.

Petitioner submits that the National Labor Relations Board would be the first to agree that to inhibit this

---

[5] "It is the purpose and policy of this Act . . . to provide orderly and peaceful procedures for preventing the interference by either (labor and management) with the legitimate rights of the other." 29 U. S. C., Sec. 151 (b).

[6] Observe remarks of Senator Morse about, "refusal of a recalcitrant employer or union . . . to consent." Congressional record, Senate, June 5, 1947, 93 Cong. Rec. 6611.

"consent" factor would produce manifold procedural problems and burdens to the federal agency vested with maintaining stability between labor and management.

Section 9 (c) (1) of the Act provides that upon a petition filed, a question of representation exists, the Board must resolve it through an election by secret ballot. The election details are usually left to the Board. The National Labor Relations Board has asserted that said elections are conducted in accordance with strict standards designated to assure that the participating employees have an opportunity to determine and register a free and untrammeled choice in the selection of a bargaining representative.

Any party to an election who believes that the standards have not been met, may file timely objections to the election with the Regional Director under whose supervision said election was held. In that event, the Regional Director may as a situation warrants either make an administrative investigation of the objections or hold a formal hearing to develop a record as a basis for his decision. If the election was held pursuant to a consent election agreement authorizing the determination by the Regional Director alone, the Regional Director will then issue a decision on the objections which is final (Section 102.62 (a)).

Conversely, if the election was held pursuant to a stipulated consent election agreement authorizing a determination by the Board rather than the Regional Director, a subordinate agent, the Regional Director will then issue a Report on Objections which is then subject to exceptions by the parties and by the decision by the Board.[7]

---

[7] Board's Rules and Regulations, Section 102.62 (b), 102.69 (c). The only **possible** means to assure determination of fact and law by the Board and **not** by the subordinate Regional determinative process is to "consent" under this rule, e. g., Section 102.62 (b).

BLEED THROUGH POOR COPY

However, if the election was directed by the Board without "consent", the Regional Director is required to hold an initial hearing and an investigation of the issues raised by the Petition as filed and thereafter, upon objections being filed, make a report on the objections, subject to exceptions with the final decision to again be made by the Board, or secondly, dispose of the issues by issuing a decision, which again is then subject to review by the Board.[8]

It is remembered that the employees of this Petitioner were involved in this election process in the year 1967. It is reported[9] that 557,822 employees voted in Board conducted elections during this period of time. During this year, the Board conducted 7,882 elections among employees to determine their choice of a bargaining representative. Seventy-Seven per cent of these elections (6,324) were conducted upon a "consent" arrangement among the parties.

The Petitioner submits that without a cooperative public policy and lawful attitude of parties before the National Labor Relations Board, that reflects mutual consent to utilize its processes, a totally catastrophic procedural and economic result will occur. It follows, therefore, and the Petitioner submits that anything that deters from such voluntary "consent" results in protracted circumstances that do not effectuate the policies of the Act, nor further the national interest. "Arbitrary power"[10] when experienced or identified gives rise to anarchy.

---

[8] Board's Rules and Regulations. Section 102.69 (c), Section 102.69 (e).

[9] Thirty Second Annual Report of the National Labor Relations Board; fiscal year 1967, page 11 (G. P. O. 1968).

[10] The only means an Employer can obtain judicial review of an issue directed at choice of the bargaining representative is to tacitly (and with premeditation, knowingly) violate the National Labor Relations Act by refusing to meet and bargain with the labor organization involved. In comparison, the Labor or-

It is lastly noted that of the 2,265 representation hearings conducted by the Board in 1967, only 173 such hearings were held concerning objections to conduct affecting the results of said elections.[11]

This Petitioner, by consenting to hold the election before the National Labor Relations Board, did so only on the condition (and for the reason) that all questions of fact and law would be determined by the Board and its Congressionally ratified Members and not by a subordinate official, the Regional Director for the Twenty-Sixth Region of Memphis, Tennessee. Thereafter, no hearing was afforded to these parties on timely objections filed.

Procedural error is compounded when the National Labor Relations Board limited its perusal of this circumstance to consider only (1), the Employer's objections, (2) the Regional Director's Report and (3) the Employer's exceptions thereto (J. A., p. 34; Appendix E, pp. A-19—A-21) without consideration or observation of any evidence, testimonial or exhibitory, submitted to the subdelegatee.

Thereafter, a duly appointed Trial Examiner also procedurally refrained from evaluating evidence by confining his determination to merely a judgment on the pleadings.

The fact that the Petitioner was denied a hearing in this case, would be directly contrary to decisions issued by other distinguished court of appeals. **NLRB v. Capital Bakers, Inc.** (CA-3, 1965), 351 F. 2d 45; **NLRB v. Trancoa**

---

ganization has absolutely no means to obtain review by the federal courts under the Act and present Board procedures. "Arbitrary Power" is defined by **Black's Law Dictionary**, West Publishing Co., 4th Edition, 1951, p. 134 to be, "Power to act according to one's own will; especially, applicable to power conferred on an administrative officer who is not furnished any adequate determining principle. **Fox Film Corporation v. Trumbull**, D. C. Conn., 7 F. 2d 715, 727."

BLEED THROUGH POOR COPY

Chemical Corporation (CA-1, 1962), 303 F. 2d 456; **Home Town Food, Inc. v. NLRB** (CA-5, 1967), 379 F. 2d 241; **Graphic Arts Finishing Co. v. NLRB** (CA-4, 1967), 380 F. 2d 893; **Sonoco Products Corp. v. NLRB** (CA-9, 1968), 399 F. 2d 835; **Bausch & Lomb, Inc. v. NLRB** (CA-2, 1968), 404 F. 2d 1222. This procedure was thereafter expeditiously adopted by the National Labor Relations Board without question and apparently, confirmed by the United States Court of Appeals for the Sixth Circuit without comment.[12]

In summary, it is therefore the Petitioner's purpose to have such expedited procedure stopped in deference to due process of law. The Federal Courts should not (and in other circumstances do not) condone the use of arbitrary power by administrative agencies; secondly, the party before the National Labor Relations Board should not be required to intentionally violate the mandates of the Act to secure judicial, if not proper administrative, evaluation of the issues raised below; and thirdly, this matter results in a direct deterioration of the "consent" procedures which historically have proven to insure industrial peace among both labor and management, and certainly to the benefit, and in the interest, of the National Labor Relations Board itself.

The Petitioner therefore, respectfully submits that for the above three reasons, this Petition for Writ of Cer-

---

[12] This petitioner before court below pointed directly at this defect in its submitted Answer to Application for Enforcement of Order of the National Labor Relations Board and Cross-Petition to Review and Set Aside Said Order and thereafter, in its brief submitted to the court. (This received expeditious response from the appellate division of the National Labor Relations Board by form of a reply brief raised in this regard.) The thrust of the National Labor Relations Board reply brief asserted that "the Board's rules entitled this company to obtain Board review on the merits of the Director's report" (reply brief for the National Labor Relations Board, on application for Enforcement, page 3). The record does not support the assertion of the National Labor Relations Board in this respect either.

tiorari warrants due consideration, evaluation, and the subsequent voice of this Court.

The Decision Below Is In Conflict With the Decision of the Second Circuit With Regard to These Expedited Procedures Promulgated by the National Labor Relations Board.

The Second Circuit Court of Appeals in **Pepsi Cola Bottling Company v. NLRB**, 409 F. 2d 676 (CA-2, March, 1969) stated:

> "The National Labor Relations Board has adopted a rule against 'relitigation' which has the effect of denying to a litigant, in an unfair labor practice action, review by the Board of decisions made by the Regional Director in a prior representation proceedings, even if that prior decision is at the very heart of the unfair labor practice dispute . . . we find the Board's action pursuant to that rule unjustified in this case."

The Second Circuit therefore refused to enforce an Order of the Board by observing that the Company complained that the Board never independently reviewed the Regional Director's conclusion on the issues raised rather it "simply swallowed his decision into its own" (409 F. 2d at 678).

This Petitioner has been treated to an identical expedited procedure which has, by the court's acquiescence and silence, been approved by the United States Court of Appeals for the Sixth Circuit in diametric conflict to the above decided judicial rejection of the Board's expedited processes. The Second Circuit articulately concluded that, "Such deference to the Regional Director was not intended by Congress. It was decided that the Board itself must rule a litigant has committed an unfair labor practice" *Id.*

The record reflects that this Petitioner repeatedly requested the Board and the Court below to require the Board not to "shut off the parties rights to produce evi-

BLEED THROUGH POOR COPY

dence or conduct cross-examination material to the issues". See, **National Labor Relations Board v. Indiana and Michigan Electric Company**, 318 U. S. 9, 28; 63 S. Ct. 395, 405 (1943) and **NLRB v. Smith Industries, Inc.**, 403 F. 2d 899 (CA-5, 1968).

In this matter, the Board observed **no evidence** and therefore, determined nothing. No testimony, whether submitted by affidavit or through recorded transcript before a delegated hearing officer, was observed by the Respondent below. In this respect, compare **NLRB v. The Process Corporation**, 412 F. 2d 215 (CA-7, 1969).

Briefly, the record below reflects that (1) no hearing was ever conducted at any stage of the proceedings; that (2) all issues of fact were determined on an *ex parte* investigation where diametrically inopposite and conflicting evidence was presented by the parties; that (3) thereafter, the Regional Director for the Twenty-Sixth Region, clearly a subdelegatee, dismissed each and all of these objections, and by necessity, making the credibility determinations required concerning the relative assertions of the parties before him; that (4) the National Labor Relations Board reviewed not the evidence presented, but rather its inquiry was directed only as to whether or not substantial "issues" had been raised and demonstrated an abrogation of its statutory responsibility to considering only, "The Employer's Objections, the Regional Director's Report, and the Employer's exceptions thereto" (J. A., p. 34 and footnote 1 thereon); that (5) upon submission of the alleged unfair labor practice to a Trial Examiner, again a subdelegatee of the Board, Petitioner was treated to summary judgment on the pleadings with the finding of the Trial Examiner that "it is clear that all material issues of **fact** and law in this regard have been decided by the Board" (J. A., p. 66); and that (6) although the Board admittedly could not consider "issues of fact"

without evidence before it, it thereafter on May 17, 1968, issued a mimeographed form Order which contains only the relevant statement that "The Board has considered the Trial Examiner's Decision, exceptions and **the entire record of this case** and hereby adopts the Trial Examiner's findings, conclusions, and recommendations" (J. A., p. 76); emphasis supplied.

It must be remembered that which the Board characterizes as "the entire record of this case" actually consisted only of the Trial Examiner's decision (2) the Exceptions of the respondent and (3) the formal pleadings presented to the Trial Examiner upon which he granted judgment and no more. Clearly, the Board did not determine the facts because the facts (evidence[13] and testimony) were not presented to it under the expedited procedures that **Pepsi Cola**, *supra*, has now rejected.

It is this procedure that has caused conflict in the Circuit Courts and which this Petitioner hereby requests to be resolved by the Court herein.

This Petitioner is not unmindful of the fact that this Court has clearly determined that "in the absence of proof by the employer that there has been prejudice to the fairness of the election, such trivial irregularities of administrative procedure do not afford a basis of denying an enforcement to an otherwise valid Board Order." **National Labor Relations Board v. Mattison Machine Works**, 81 S. Ct. 434, 435. The circumstance of this case do not find the Petitioner making its plea below empty handed.

The company came forward with evidence that an employee discussing a memorandum distributed by the labor organization shortly before the election was conducted, said that he was going to vote against the Union, but

[13] Even the Regional Director excluded documentary exhibits presented to support the Respondent's objections (See Motion of Respondent to Produce Evidence, J. A., pp. 59-60).

BLEED THROUGH POOR COPY

after he saw the memorandum, he changed his mind. Additional evidence was submitted that another employee, again referring to literature distributed by the Union stated, "We got it, we photostated it, and distributed it through the Union meeting . . . This is what really hurt you" (J. A., p. 14). Such evidence was summarily disregarded by the Board's subdelegatee upon presentation, and upon an *ex parte* basis, he rendered decisive credibility findings in this respect.[14]

The Petitioner believes, and based upon the guidance of this Court submits, that the National Labor Relations Board is an agency with the duties and Constitutional responsibility recognized between the Civil Rights Commission as considered by this Court in **Hannah v. Larche**, 363 U. S. 480, ... S. Ct. 1502, and the Constitutional responsibilities of the Labor Management Commission of Inquiry of the State of Louisiana subject to this Court's consideration in **Jenkins v. McKeithen**, 89 S. Ct. 1843. Therein Mr. Justice Marshall, upon delivery of the opinion of the Court states: "The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause;" citing **Morgan v. United States**, 304 U. S. at 18, 58 S. Ct. at 776, **Baltimore and Ohio Railroad Company v. United States**, 289 U. S. 349, 368-369, 56 S. Ct. 797, 807. That further, "we only hold that a person's right to present his case should not be left to the unfettered discretion of the Commission". **Jenkins**, *supra*, 86 S. Ct. at 1853. Therein, both Mr. Justice Douglas and Mr. Justice Black concur with the majority by finding that this Commission does not afford procedural protec-

[14] The Board in its brief to the court below admits that if "A Regional Director ignores material evidence submitted by the objector, relies on conflicting evidence presented by another party, or otherwise makes crucial factual determinations on an *ex parte* basis, material factual issues may be raised and a hearing is required. (Brief for the National Labor Relations Board to United States Court for Sixth Circuit, pp. 23, 24.)

tion that the Bill of Rights provides and therefore denies due process of law.

It is with interest that the Petitioner finds that dissenting Justice Harlan, Justice Stewart, and Justice White also frame their evaluation of this agency of the state of Louisiana in a context that supports this Writ for Certiorari presented.

Specifically, the dissent in evaluating the Constitutional protections required by the majority of the Court of this state agency relate, "The Commission thus bears a close resemblance to certain Federal administrative agencies." 89 S. Ct. at 1858. However, the dissent distinguishes this specific commission from being afforded the full scope of due process by concluding that the agency ". . . plays only a preliminary role designed, in the usual course of events, to initiate a subsequent formal procedure in which the accused will enjoy the full panoply of procedural safeguards. For this reason, and because such agencies cannot otherwise practicably pursue their investigative functions, they have not been required to follow 'adjudication' procedures" *Id.*

Thereafter, and possibly more importantly, the dissenting members of the Court evaluate the nature and Constitutional responsibilities of the Federal Trade Commission and Securities and Exchange Commission; comparing each again to the administrative bodies in **Hannah**, *supra*, and the agency of the State of Louisiana.

Unfortunately, perhaps for the brief writer, nothing was said concerning the Respondent herein, the National Labor Relations Board and the Constitutional responsibility it must affect to, and upon, the parties before it. Conversely, the Petitioner submits that it is indeed fortunate and supports the requested granting of this Writ for Certiorari, that the Court's pronouncements concern-

BLEED THROUGH POOR COPY

ing procedural due process of the National Labor Relations Board remain vague, if not absent entirely. Petitioner therefore proposes such Constitutional standards are ripe for consideration by the Court to the ultimate benefit of the Respondent, of labor, of management, and of course, the herein aggrieved Petitioner.

In summary, the Petitioner submits that because the National Labor Relations Board has not actually considered questions of fact or the evidence presented, that its Order is not entitled to judicial approval or enforcement, and that the decision below remains in conflict with the decision of the Second Circuit with regard to the expedited procedures now promulgated by the National Labor Relations Board.

CONCLUSION

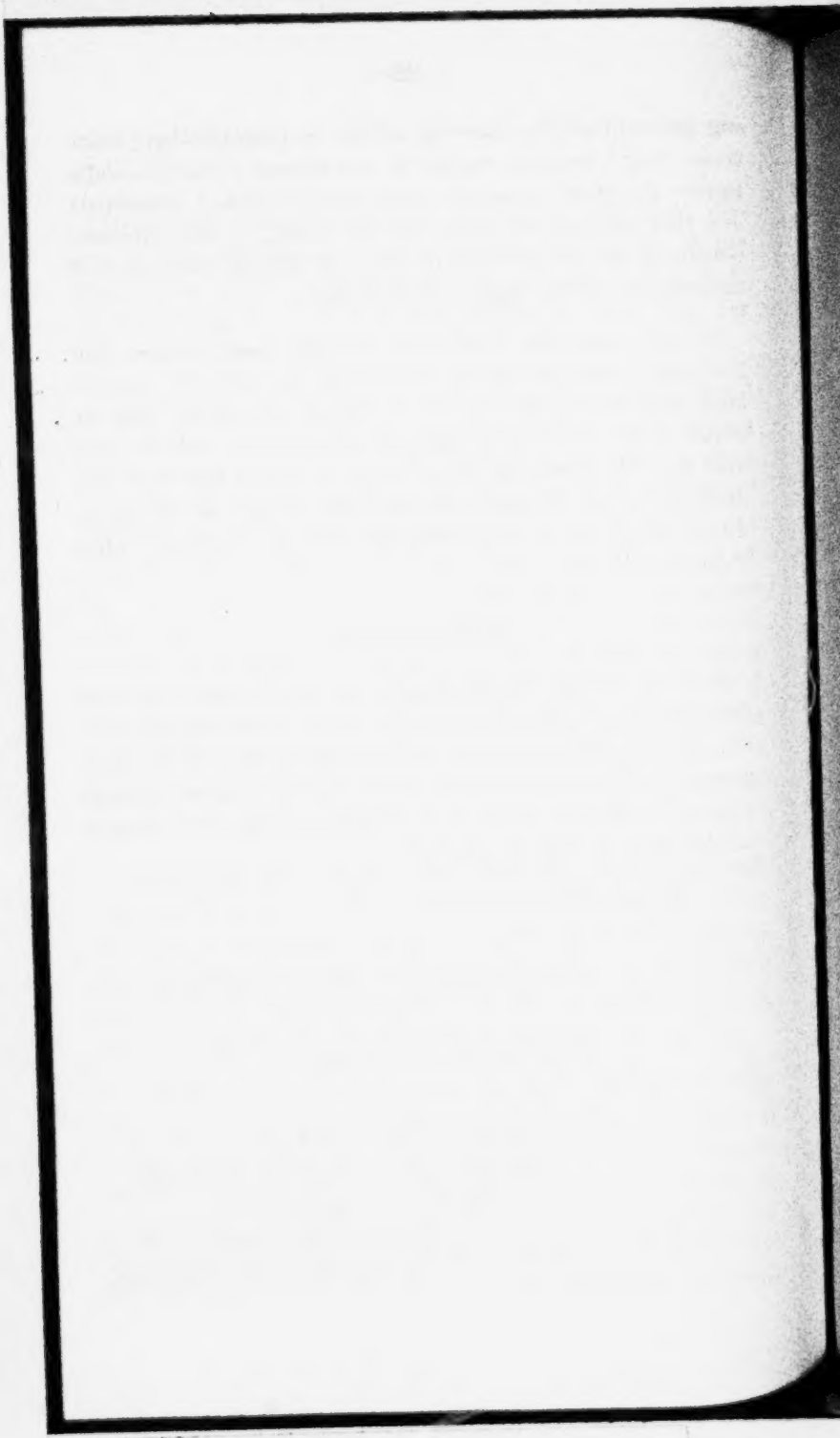
For the reasons above expressed, specifically including the conflict of Circuits and the area remaining between this Court's determination in **Hannah**, *supra*, and its more recent decision in **Jenkins**, *supra*, the Petitioner submits that a Petition for Writ of Certiorari in the circumstances of this case should be granted.

Respectfully submitted

FOWLER, BRACKHAHN, YOUNG & PERL

NEWELL N. FOWLER

RICHARD A. BRACKHAHN
Memphis Bank Building, Suite 603
44 North Second Street
Memphis, Tennessee 38103
Attorneys for Petitioner



BEST AVAILABLE COPY